United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1326

To be argued by
THOMAS H. SEAR

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1326

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSEPH SEILLER,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

THOMAS H. SEAR,
RICHARD D. WEINBERG,
Assistant United States Attorneys,
Of Counsel.

TABLE OF CONTENTS

TABLE OF CASES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1326

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOSEPH SEILLER,

Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Joseph Seiller appeals from a judgment of conviction entered on June 23, 1976 in the United States District Court for the Southern District of New York by the Honorable Irving Ben Cooper, United States District Judge, convicting Seiller of one count of conspiracy to transport stolen securities in foreign commerce and sentencing him to a term of three years imprisonment.

On June 23, 1971 two indictments were filed in the Southern District of New York against Joseph Seiller and others. Indictment 71 Cr. 675 charged Seiller and co-defendant William Silverman with conspiracy to transport stolen securities valued at $5,000 or more in foreign commerce in violation of Title 18, United States Code,

Section 371 (Count One) and transporting a stolen $1,000,000 United States Treasury bill in foreign commerce in violation of Title 18, United States Code, Sections 2314 and 2 (Count Two). The indictment also charged Seiller, Silverman, Michael Selvaggio, Stephen Salvaggio and Robert Cohn with a separate conspiracy to transport stolen securities valued at $5,000 or more in foreign commerce in violation of Title 18, United States Code, Section 371 (Count Three).

Indictment 71 Cr. 676 charged Seiller, Gabriel Infanti and Nathan Kurtz with conspiracy to transport stolen securities valued at $5,000 or more in violation of Title 18, United States Code, Section 371 (Count One) and transporting in foreign commerce 29,371 shares of American Telephone and Telegraph common stock and 15,274 shares of Boeing common stock, knowing the same to have been stolen, in violation of Title 18, United States Code, Sections 2314 and 2 (Count Two).

On May 1, 1972 Seiller pleaded guilty to Counts One and Three of Indictment 71 Cr. 675 and to Count One of Indictment 71 Cr. 676 before Judge Cooper.*

---

* Indictment 71 Cr. 675 had been assigned to the Honorable Frederick van Pelt Bryan. Judge Cooper accepted Seiller's guilty plea on Indictment 71 Cr. 675 with Judge Bryan's consent.

Infanti and Kurtz, the two co-defendants named in Indictment 71 Cr. 676, were found guilty by a jury on May 16, 1972 after a trial before Judge Cooper. This Court affirmed Infanti's conviction, but reversed Kurtz's conviction for lack of sufficient evidence. *United States* v. *Infanti*, 474 F.2d 522 (2d Cir. 1973).

With respect to Indictment 71 Cr. 675, co-defendant Silverman was acquitted on Count Three by a jury on June 26, 1972 after a trial before Judge Bryan. The remaining charge against Silverman and the charges against Selvaggio, Salvaggio, and Cohn were dismissed on December 14, 1972 with the filing of a nolle prosequi.

On January 11, 1973, Seiller moved, pursuant to Rule 32(d), Fed. R. Crim. P., to withdraw his guilty pleas. Judge Cooper denied this application on January 24, 1973. On March 21, 1973, Seiller was sentenced to concurrent three year terms of imprisonment on each of the three conspiracy counts to which he had pleaded guilty.*

On April 9, 1974 Seiller moved, pursuant to Title 28 United States Code, Section 2255, to vacate his conviction and sentence. In a memorandum opinion filed on June 13, 1974, Judge Cooper denied the motion without a hearing.

On January 11, 1975 Seiller completed serving a two to seven year sentence imposed by a New York State court for a violation of the New York State Penal Law and was remanded to federal authorities to commence serving his three year concurrent sentences imposed by Judge Cooper. On February 24, 1975 Judge Cooper denied appellant's application for bail pending appeal of the order denying his § 2255 application.

On December 1, 1975, this Court affirmed Judge Cooper's refusal to vacate the judgment of conviction on Count Three of Indictment 71 Cr. 675 and reversed the order of the District Court as to Count One of Indictment 71 Cr. 675 and Count One of Indictment 71 Cr. 676. This Court remanded the case to enable Seiller to replead to those two counts and for reconsideration of the sentence on Count Three of Indictment 71 Cr. 675. On June 23, 1976 Seiller was resentenced on that count to three years imprisonment, and pleaded not guilty to the other two counts.

---

* The substantive counts were dismissed with the consent of the Government after sentence was imposed.

Statement of Facts

On May 1, 1972 Seiller, accompanied by his attorney, James J. Cally, Esq., appeared before Judge Cooper. Mr. Cally informed the District Court that appellant wished to withdraw his previously entered plea of not guilty and wished to plead guilty to each of the conspiracy counts in Indictments 71 Cr. 675 and 71 Cr. 676 (Tr. 3).*

At the time the charges in each of those counts were read in full. The District Court determined that Seiller understood each charge and Seiller pleaded guilty to each of the three counts. The District Court carefully explained that Seiller's guilty plea could not be conditioned on any promise or understanding, that there could not be "any strings attached to the taking of a plea of guilty" and Seiller acknowledged that he was pleading guilty "without any conditions of any kind." (Tr. 15-16). Judge Cooper explained the maximum sentences of 5 years imprisonment and the fines that Seiller could receive on each count to which he was pleading guilty. (Tr. 17-18).

The Court made the following inquiry to determine if a factual basis existed for the guilty pleas:

By the Court:

> Q. Will you please tell me briefly what it is that you admit that you did in connection with each one of these three charges?
>
> Now, the reason Mr. McDermott suggests that is that sometimes the defendant doesn't quite un-

---

* "Tr." refers to pages of the transcript of the plea proceedings held on May 1, 1972.

derstand the language of the indictment and to be absolutely sure that the defendant knows what he's doing and what he's pled guilty to, is a good way to say, "What are you pleading guilty to? Why? What did you do?"

The man says, "I stole goods, I robbed a bank. I went in there and told them to give me the money or I'd blow up the bank."

That is the way he tells what he did.

Now, will you please recite what you did with respect to even one of these three charges?

A. In each one of the three charges I introduced parties to each other which committed then the crime of which I am accused. That is how I got involved in the conspiracy.

Q. You are not telling us. You are summing it up. What did you do that makes you guilty? What do you admit that you did? Did you, with knowledge, know that the goods that were being transported were obtained and so forth and so forth? Did you know that?

A. Not in all three situations.

Q. Then I wish you would tell me. You had better go ahead. You are an intelligent person. What is it you are pleading guilty to?

A. To the conspiracy charge because I hold myself responsible that I introduced parties to each other which committed the crimes I am accused of.

Q. But you knew that they were committing them?

A. Yes, I knew that.

Q. And the crimes that they committed, what do you mean by that? They did what?

A. In one case they were trying to sell United States Treasury bills, in another case——

Q. Knowing they were stolen?

A. Not known to me but later found out it was stolen.

Q. Yes?

A. And in the other case, partners of mine asked me to find a buyer for stolen securities which I didn't know at that time if they were stolen but I was later on informed that they were stolen.

And the third time I introduced Mr. Silverman to Mr. Reeves, (sic) who is a witness, I think, for the purpose to make arrangements to sell-to purchase stolen securities.

The Court: What do you say, Mr. McDermott?

Mr. McDermott: That fairly sums it up, Your Honor" (Tr. 18-20).

On January 11, 1973 Seiller moved, pursuant to Rule 32(d), Federal Rules of Criminal Procedure, to withdraw his guilty pleas. The principal reasons advanced in Seiller's affidavit in support of the motion were: (1) he had entered the plea "improvidently" because he was "in a state of debilitating health, which rendered him unable to think properly" and (2) upon subsequent consultation with other counsel, he learned that he had been "ignorant of his rights under the circumstances, and that, therefore, the consequence of his acts were made under a mistake or misapprehension". (App., Ex. F, p. 1). The affidavit also added that "there was no plea bargaining." (Id., p. 2).

Seiller's affidavit also alleged that part of his difficulty was attributable to his "language barrier" which allegedly prevented him from effectively communicating with his attorney concerning his rights and from understanding the proceeding at which he pleaded guilty. (Id.)

In a memorandum dated January 24, 1973, Judge Cooper denied the application and found that there was absolutely no basis in fact to support Seiller's claim that his health or an alleged language problem had prevented him from understanding any step in the plea procedure. (App., Ex. G).

A presentence report was submitted to the District Court prior to the initial sentencing of Seiller. The probation officer noted that Seiller's role in the conspiracy charged in Count Three of Indictment 71 Cr. 675 was to arrange for delivery of over $1,000,000 worth of stolen corporate and municipal bonds at the Commodore Hotel in New York, New York in order that they might be sold to a prospective buyer. The sale never took place because the prospective buyer, unknown to Seiller, was working with the Federal Bureau of Investigation and after the securities were delivered all of the defendants were arrested.

The report also noted Seiller's extensive prior criminal record for similar fraudulent activities. He was convicted in 1951 in Weisbaden Germany and imprisoned for 10 months for attempted fraud. In addition in 1961, 1962, 1963 and 1966 arrest warrants were issued in Germany for Seiller charging him with different offenses involving the fraudulent misappropriation of "very substantial sums of money" from "numerous individuals and firms".*

---

* Seiller left Germany in 1967 and apparently never stood trial on those charges.

Furthermore, the probation officer emphasized that Seiller had continued his activities after he came to the United States. At the time the report was prepared indictments were pending in the Supreme Court of New York for New York County charging Seiller with 107 counts of conspiracy, larceny, and criminal possession of stolen property and forged instruments pertaining to the theft of more than $700,000 in dividend checks from various brokerage houses. Prior to sentence on the federal charges Seiller was convicted on certain of those charges and had been sentenced to a term of two to seven years imprisonment.

The trial court was informed of other facts relevant in evaluating Seiller's actions and the likelihood of rehabilitation. The probation officer stated that while Seiller had pleaded guilty to the three conspiracy counts he claimed to be the "victim" rather than the "culprit" and that it was "impossible to accept the veracity of Mr. Seiller's statements pertinent to the instant offense." He further noted that while Seiller made many claims about how successful his company Orfico International had been in international business transactions in fact it appeared that the company was little more than a "Paper empire with very little actual substance."

In addition the report related how the defendant, a German national, had attempted to pressure certain United States Senators and an Assistant to the President to help him obtain permanent residency in the United States. The probation officer characterized Seiller's communications to those officials as "heavy handed attempts at manipulating . . . highly placed Government officials to the defendant's advantage through threatening the U.S. Economy with loss of substantial investment capital allegedly controlled by the defendant for numerous interests which he represented professionally."

On March 21, 1973 prior to being sentenced, Seiller told the trial court "What I did wrong I am sorry for. The only thing I can say—I can give you assurances there will be no repetition." (Sent. Tr. 3).* Seiller was sentenced to three years imprisonment on each count to run concurrently with each other but consecutively to his state sentence. Although both Seiller and his attorney spoke on his behalf neither person suggested that the presentence report was in any way inaccurate.

By a letter dated April 30, 1973 Seiller requested a reduction of sentence. In that letter he stated that "I was earmarked to be a criminal by the U.S. Attorney's Office" and that after that "everything I had done and said was distorted and made look bad".

In a further effort to place the blame for his wrongdoing on others he said that he could not "present [his] own side" because "Your Honor shut me up before the sentencing", and Seiller also intimated that being in a foreign country had caused his conviction. The motion to reduce the sentence was denied.

On April 1, 1974 Seiller moved to vacate the judgments of conviction and in his moving affidavit submitted in support of the Section 2255 motion (App., Ex. F), Seiller again claimed that he was not guilty of the three offenses of which he had pleaded guilty.

Seiller reiterated the previous arguments regarding his lack of understanding of English and his poor health at the time of the pleas. In contrast to his January 11, 1973 affidavit, in which he had stated that there had been no plea bargaining, Seiller asserted for the first time that the Assistant United States Attorney in charge of the case, Maurice McDermott, had told him that "the

---

* "Sent. Tr." refers to pages of the sentencing proceedings held on March 21, 1973.

court would be made aware of [his] cooperation and that [he] could expect leniency." Seiller also asserted that his own attorney, Mr. Cally, had told him "that the most [he] could expect would be a suspended sentence", if he pleaded guilty. (App., Ex. F, p. 3).

In his affidavit in opposition to the motion, Mr. McDermott denied ever telling Seiller that he could expect the Court to treat him leniently and denied that he had ever told Seiller "that the Government would request such treatment for him." (App., Ex. G, par. 8).

Mr. McDermott stated that Seiller, accompanied by his attorney, had voluntarily appeared at his office on one or two occasions on or about May 1, 1972 for the purported purpose of cooperating with the Government in the prosecution of Kurtz and Infanti whose trial was imminent. As a result of these discussions, McDermott concluded that Seiller would not be a credible witness because of his evasiveness and his consistent attempts, even in the face of evidence to the contrary, to minimize his criminal involvement in the three separate stolen securities' schemes. As a result, he was never called as a witness against any of the co-defendants. (App., Ex. G, Par. 7).

Mr. Cally, Seiller's attorney, also submitted an affidavit in which he stated that he had never told Seiller that he could expect a suspended sentence for his cooperation with the authorities and that no promises or representations of any kind were made to Seiller (App., Ex. G). In a reply affidavit Seiller modified his allegations about the alleged promise of leniency and admitted that the Assistant United States Attorney and his former attorney had correctly stated the facts in their affidavits. (App., Ex. H).

Seiller appealed the trial court's denial of his petition. In affirming the judgment of conviction on Count Three of Indictment 71 Cr. 675 this Court agreed with the District Court that Seiller's allegations of promises of leniency, ill health and language difficulties were so clearly without factual support that a hearing on those issues was not required. Judge Timbers, who wrote the opinion of the Court, would have affirmed the convictions as to all three Counts. However, with Judge Timbers dissenting on this point, this Court reversed as to Count One of Indictment 71 Cr. 675 and Count One of Indictment 71 Cr. 676 on the ground that an insufficient factual basis existed to support the guilty plea on those counts. (App., Ex. J).

On June 23, 1976 Seiller pleaded not guilty to Count One of Indictment 71 Cr. 675 and Count One of Indictment 71 Cr. 676 Seiller was resentenced on Count Three of Indictment 71 Cr. 675 to the same three year term he had previously received on the conviction on that Count.

At the proceeding, the Assistant United States Attorney noted that Seiller's counsel had urged Seiller's possible deportation as a factor to be considered in resentencing. The Assistant United States Attorney noted that there was no certainty that Seiller would be deported if he were released from prison. While he did not recommend or even suggest such a procedure he noted that he had informed Seiller's counsel that in the past certain judges had sentenced offenders to suspended sentences upon the condition that the offender agree to deportation. (App., Ex. C, pp. 3-5).

Counsel for Seiller asserted that Seiller was "perfectly willing to voluntarily leave the country". He went on to urge that Seiller be sentenced to the one and

one-half years he had served of his federal sentence. The principal factors cited were Seiller's health problems, his prison records, and the possibilities of a divorce action by Seiller's wife and deportation from the United States. Counsel did not question in any way the statement of facts as to Seiller's past activities contained in the probation report. Seiller himself declined to say anything on his own behalf. (App., Ex. C, pp. 5-8).

Judge Cooper noted that he had been satisfied with the guilty pleas to the three counts but had realized that the defendant had "ducked" and "fenced" when "the crucial words were mentioned." (App., Ex. C, p. 10). The Court emphasized that the defendant's physical condition was the chief reason it did not press the defendant further at that point. (App., Ex. C, pp. 10-14). The District Court unequivocally stressed its belief that this Court was correct in reversing his acceptance of the guilty plea to two of the counts. (App., Ex. C, pp. 11-12).

The District Court reaffirmed its view based on previous observations that Seiller was a man of superior intellectual achievement. The sentencing judge reviewed all the facts which established that not only had Seiller misused his intelligence, but that he was, in the Court's words, "Mr. Fraud . . . Mr. Operator . . ." and "a fraud, a manipulator, a faker, a conniver." (App., Ex. C, pp. 14-15). The court specifically noted that whenever it was consistent with his interests Seiller had attempted to place the blame for his predicament on others, including the judge and the Assistant United States Attorney, instead of himself. The District Court noted the enormous amount of money that was involved in Seiller's fraud. (App., Ex. C, p. 16).

The Court recognized that it had a substantial amount of information available in considering the appropriate

sentence. Specifically, the Court referred to the physical demeanor of Seiller * and to the admissions Seiller made with respect to the two guilty pleas which had been vacated. Seiller's lengthy past record and the enormity of his prior fraudulent activities was discussed in detail. (Tpp., Ex. C, p. 16). The Court referred to his criminal convictions in Germany and his recent conviction in New York for larceny. Seiller's actions in attempting to manipulate the Immigration and Naturalization Service were reviewed. (App., Ex. C, pp. 20-21). The Court also reaffirmed its earlier findings that Seiller's claims as to lack of understanding caused by his health problems and his alleged language difficulties were baseless. (App., Ex. C, pp. 21-22). Indeed this Court also found that based on Seiller's age, education, and "alacrity of responses and his show of intelligence," Seiller understood the nature of the charges against him. (App., Ex. J, p. 6526).

Despite the strong language the Court used in evaluating Seiller's conduct and the likelihood of rehabilitation, the District Court also pointed out the positive factors which it had considered including Seiller's marital problems, his conduct as an inmate, his mother's health problem and Seiller's own physical impediments. (App., Ex. C, pp. 22-23).

The District Court noted that Seiller had earlier expressed a desire to leave the United States. The trial court made it clear that if Seiller did as he had said he desired to do and decided to consent to deportation the

---

* During the resentence proceeding itself the Court noted on the record that Seiller was "smirking" and neither Seiller nor his counsel suggested at that time that the court's observation was not accurate. (App., Ex. C, pp. 16-17).

Court would strongly consider reducing the sentence to time served.* (App., Ex. C, p. 26).

Appellant's counsel never intimated that any of the facts alluded to by the District Court concerning the defendant's prior record or his participation in the criminal venture to which he pleaded guilty were materially untrue. At no time did appellant's counsel suggest that any information contained in the presentence report was erroneous.

ARGUMENT

The District Court Properly Exercised Its Discretion In Sentencing Seiller.

Appellant claims that his sentence should be vacated and the case remanded to a different District Judge for resentencing because the sentencing judge relied on improper factors and evidenced a personal animus towards the appellant in imposing the sentence. Appellant argues that the District Judge relied improperly on the following factors:

1) The District Judge believed that the appellant had perpetrated a fraud on the District Court and this Court by challenging the validity of the guilty pleas;

2) The District Judge misstated the law regarding the scope of his sentencing discretion when he informed the appellant that he could impose the maximum sentence; and

3) The District Court improperly considered the vacated guilty pleas in imposing the sentence.

---

* Despite his earlier statements Seiller has apparently changed his mind and intends to attempt to resist deportation since he has not, as yet, agreed to leave the country and possibly be released from prison.

A reading of the sentencing minutes and a review of the relevant precedent reveals that no grounds exist to justify vacating appellant's sentence and remanding for resentencing by a different District Judge.

Under federal law sentencing is vested exclusively in the discretion of the trial court. When a sentence is imposed within the statutory guidelines an appellate court can only disturb it in extraordinary cases where there has been a clear abuse of discretion, *Dorszynski* v. *United States*, 418 U.S. 424, 440-41 (1974); *United States* v. *Tucker*, 404 U.S. 443, 447 (1972); *Gore* v. *United States*, 357 U.S. 386, 393 (1958); *Blockburger* v. *United States*, 284 U.S. 299, 305 (1932); *United States* v. *Goldberg*, 527 F.2d 165 (2d Cir. 1975); *Counts* v. *United States*, 527 F.2d 542 (2d Cir. 1975); *United States* v. *Sweig*, 454 F.2d 181, 183-84 (2d Cir. 1972).

This Court has repeatedly held that absent the sentencing judge's reliance on impermissible factors or upon materially incorrect information a sentence falling within statutory limits is not reviewable. *United States* v. *Wiley*, 519 F.2d 1348, 1351 (2d Cir. 1975); *United States* v. *Velazquez*, 482 F.2d 139, 142 (2d Cir. 1973); *United States* v. *Brown*, 479 F.2d 1170 (2d Cir. 1973); *United States* v. *Mitchell*, 392 F.2d 214 (2d Cir. 1968); *United States* v. *Holder*, 412 F.2d 212 (2d Cir. 1969).

A. The District Court Did Not Rely On Any Improper Factors In Resentencing Seiller

Seiller first claims that the sentencing judge was motivated by a belief that Seiller's act of appealing the denial of his § 2255 petition was itself a fraud. However, the trial judge stated that he viewed the reversal of his decision not to vacate the conviction on two counts as

completely correct. (App., Ex. p. 11) The record reveals that the District Court was simply acknowledging its error in accepting the initial guilty plea. Since the District Court unambiguously acknowledged the invalidity of the initial plea, it is difficult to comprehend appellant's claim that the trial court accused appellant of perpetrating a fraud by challenging the validity of the plea.

The portions of the sentencing transcript quoted in appellant's brief (pages 18-23) do not justify the conclusion that the District Court believed the appeal of the guilty plea was an effort to defraud the judiciary. The transcript references quoted by appellant concerned the trial court's rejection of appellant's argument that he was unaware of the nature of the charges against him and the District Court's consistent view that the appellant was a manipulator who tried to blame others for his plight. The District Court did reject the view that appellant's poor health and alleged language problem made it impossible for him to understand the charges against him (App. Ex. C, pp. 21-22). This Court in remanding this case for resentencing also concluded that based on Seiller's representation by counsel, his age, his university education, his ability to respond to questions, and his intelligence, he understood the charges against him. (App. Ex. J, p. 6526).

Appellant's brief endeavors to convey the false impression that the District Court's characterization of appellant as "Mr. Fraud" or "Mr. Operator" was based on appellant's appeal of that court's denial of his § 2255 petition. As the Statement of Facts in this brief amply demonstrates, *supra* at 12-13, these characterizations were based on the material contained in the presentence report, the crime the appellant pleaded guilty to committing, and appellant's prior criminal record. There was no claim below and none appears in appellant's brief that

any of the information in the probation officer's report contained any material inaccuracies. The information contained in that report provided a sufficient basis for the District Court to conclude that appellant deserved the appellation "Mr. Fraud."

The second factor appellant claims that the District Court impermissibly considered was its alleged misstatement of law that he could impose the maximum sentence "in the light of what has been brought to my attention since the appearance of the defendant." (App. Ex. C, pp. 22-23). Judge Cooper's statement was not an erroneous statement of law. The trial judge is not absolutely precluded from imposing a greater sentence than the original sentence; the greater sentence, however, must be based on events occurring subsequent to the imposition of the initial sentence. *North Carolina* v. *Pearce*, 395 U.S. 711, 723-726 (1969). Since the subsequent sentence imposed by the District Court was identical to and not greater than the sentence imposed prior to the appeal, there can be no constitutional infirmity to the three year sentence imposed by the sentencing judge. See *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973); *North Carolina* v. *Pearce, supra.*

Another factor was, however, before the District Court at the time of the resentence which was not available at the time of the initial sentence. This factor related to the defendant's filing of palpably deceptive and false affidavits in an effort to secure relief from his three year sentence.

In his affidavit of January 11, 1973 submitted on behalf of his motion to withdraw his guilty plea Seiller explicitly stated that "there was no plea bargaining herein." (App. Ex. D, p. 3). In his sworn affidavit of April

1, 1974 supporting his § 2255 petition, the appellant asserted that the Assistant United States Attorney told him that "the court would be made aware of [his] cooperation and that [he] could expect leniency." Seiller also claimed that his own attorney told hi "that the most [he] could expect would be a suspended sentence," if he pleaded guilty. (App. Ex. D, p. 3). The Assistant United States Attorney and Seiller's attorney submitted affidavits denying Seiller's charges (App., Ex. G). Confronted by the affidavits of the Assistant United States Attorney and his own attorney unequivocally denying Seiller's sworn accusations, Seiller submitted another affidavit modifying substantially the April 1, 1974 sworn affidavit he had filed (App., Ex. H). This manipulation of sworn affidavits by appellant was a factor which a sentencing judge could properly consider in imposing a new sentence.

Seiller further claims that the District Court impermissibly considered information it had received from Seiller concerning the two counts as to which the convictions were reversed. The sentencing minutes do not indicate that the District Court considered the defendant guilty of those two charges. Rather the sentencing judge considered in resentencing appellant information gleaned from the incomplete allocution. Seiller maintains there was no such information. This assertion fails to recognize certain information contained in the allocution relevant to sentence.

Seiller's admission as to his activities with respect to the crimes charged in those counts was relevant as to sentence on Count Three of Indictment 71 Cr. 675. The conspiracies charged in Count One of Indictment 71 Cr. 765 and Count One of Indictment 71 Cr. 766 commenced in 1969 and the overt acts were committed also in that

year. The conspiracy for which Seiller was convicted and sentenced commenced in 1970. Thus, Seiller's admission at the original plea proceedings established that *prior* to entering the 1970 conspiracy he knew that people he had previously introduced to sell securities were selling stolen securities.* Under those circumstances Seiller's decision to conspire to sell stolen securities in 1970 involved a more deliberate decision to violate the law than might have been the case if Seiller had never dealt with securities. Accordingly, the trial court could find that Seiller was more culpable and less likely a candidate for rehabilitation than someone who had had prior to such an offense, absolutely no involvement in selling securities. Since a sentencing judge may properly consider evidence introduced with respect to crimes of which the defendant was acquitted, *United States* v. *Sweig*, 454 F.2d 181, 184 (2d Cir. 1972), then a judge can consider statements made by a defendant during a guilty plea even if that plea is eventually set aside.

B. The District Court Did Not Exhibit A Personal Hostility and Prejudice Towards Appellant Making It Impossible For The Court To Properly Sentence The Appellant

The sentencing minutes are devoid of the type of emotional, vituperative and plainly erroneous charges by a sentencing judge which would justify this Court in remanding this case for resentencing by a different District Judge. On occasion the District Court used strong

---

* This Court in reversing appellant's guilty pleas as to the conspiracies which occurred in 1969 did so because the appellant had failed to acknowledge that at the time he introduced the conspirators to each other for the purpose of selling securities, he knew that the securities had been stolen.

and vivid language in describing Seiller's conduct. Although other judges might not have been as candid in articulating the legitimate and relevant factors to be considered in sentencing Seiller, it is clear that there was a factual basis in the record for every observation the trial court made.* Under those circumstances to infer that this sentence was based on emotional hostility would discourage trial judges from stating on the record their reasons for imposing a particular sentence. Compare *United States* v. *Cardi*, 519 F.2d 309 (7th Cir. 1975) with *Browder* v. *United States*, 398 F. Supp. 1041, 1046 (D. Oregon 1975). Trial judges should be encouraged to state candidly the reasons for imposing a particular sentence.

The only case which Seiller refers to which holds that a sentence should be remanded because of the emotional hostility of the sentencing judge is *United States* v. *Duhart*, 496 F.2d 941 (9th Cir. 1974). In that case the trial judge, inflamed by facts of a sordid rape case, remarked that if he were not limited by his judicial position he would "cut something out" of the defendant or "call the husbands of these four women down here and put you and them in here."

The trial court's characterization of the defendant and his actions in this case do not approach this type of extreme and obviously inflamed and hostile comments. Moreover, the trial court's actions at the end of the

---

* Seiller's claim that the Court's observations as to Seiller's demeanor at the time of resentence provide a basis to suggest improper motivation by the trial judge emphasizes the lack of merit to his claims. One of the principal reasons why a trial court has broad discretion in sentencing is because of its unique ability to observe the demeanor of a defendant. E.g., *United States* v. *McCoy*, 429 F.2d 739 (D.C. Cir. 1970).

sentencing proceeding belie the notion that emotional hostility motivated the sentence. The Court itself took pains to state:

> "there was no personal vindictiveness here whatsoever but I felt the time had come to hold up the mirror to this defendant that I am very much interested in rehabilitation, that I have seen none of that in evidence with regard to this defendant." (App. Ex. C, p. 30)

Moreover, the District Court left no doubt that it would strongly consider Seiller's counsel's proposal that if Seiller would consent to deportation his sentence would be reduced to time served. (App. Ex. C, pp. 26-31). It is fanciful, in light of that commitment by the Court, to claim that Seiller's sentence was not based on the factors set forth by the trial judge on the record but rather on an alleged personal animosity.

The District Judge employed vivid and commonly understandable phrases to describe appellant's criminal activity. Such appellations as "a manipulator, a faker, a conniver" clearly articulate for a defendant the Court's justifiable feelings for his previous criminal conduct. As long as a factual basis exists for such characterizations, and the presentence report in this case contains such a foundation, then such language can be useful in explaining to a defendant why society cannot tolerate his conduct and why the Court hopes he alters his lifestyle so as to become a productive member of society.

A trial judge is invested with broad discretion in sentencing because he is clearly in the best position to evaluate "candidly, honestly, and objectively all factors which in human experience . . . properly reflect upon the matter of appropriate punishment." *United States* v.

Cardi, 519 F.2d 309, 314 (7th Cir. 1975). See generally, Symposium, Appellate Review of Sentence, 32 F.R.D. 257 (1962).

In his brief Seiller makes many allegations relating to the emotional basis for the sentence. Seiller has failed to establish that the sentencing court relied on any factors which were improper, or materially untrue. See *Townsend* v. *Burke*, 334 U.S. 736, 741 (1942); *McGee* v. *United States*, 462 F.2d 243, 245 (2d Cir. 1972).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

THOMAS H. SEAR,
RICHARD D. WEINBERG,
Assistant United States Attorneys, Of Counsel.

★ U. S. Government Printing Office 1976— 614—300—714

Form 279 - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Thomas H. Seal being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 4th day of October he served a copy of the within Brief by placing the same in a properly postpaid franked envelope addressed:

Federal Defenders Service Unit
509 United States Court House
Foley Square
New York, New York Attn: Michael Young

And deponent further says that he sealed the said envelope and placed the same in the mail ~~———~~ drop for mailing outside the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Thomas H. Seal

Sworn to before me this

4TH day of October 1976

Maria A. Israelian

MARIA A. ISRAELIAN
Notary Public, State of New York
No. 31-4521851
Qualified in New York County
Term Expires March 30, 1978